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Supreme Court
of the
United States

October Term, 1979

NO. 79-1480

DENNIS EDWARD McGUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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NO.

DENNIS EDWARD McGUIRE,
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v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Dennis Edward McGuire petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 26, 1979, rehearing denied February 20, 1980.

OPINION BELOW

The opinion of the court of appeals is reported at 608 F.2d 1028 (5th Cir. 1979), as is reproduced as Appendix A. The order denying rehearing is reproduced as Appendix B. No opinion was rendered by the district court.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1979, a petition for rehearing and rehearing en banc was denied on February 20, 1980. This petition is being filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Sixth Amendment right of compulsory process for obtaining witnesses, require the granting of the Petitioner's severance when his co-defendant under oath states he will testify at a separate trial and provide exculpatory testimony for the defendant?

2. Do Rule 14 of the Federal Rules of Criminal Procedure and the due process clause require a severance when the Petitioner must choose between cross-examining a co-defendant's witness to show that the witness is lieing and lose exculpatory testimony of the co-defendant, or not cross-examine the co-defendant's witness to gain the co-defendant's exculpatory testimony?

3. Are tape recorded statements made during a drug transaction which are characterized as "puffing", and which have never been verified as true, hearsay as defined by Rule 801(c) of the Federal Rules of Evidence and excludable pursuant to Rule 802?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF CRIMINAL PROCEDURE AND EVIDENCE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . . to have compulsory process for obtaining witnesses in his favor . . . ."

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> "If it appears that a defendant . . . . is prejudiced by a joinder . . . . of defendants in an indictment . . . . by such joinder for trial together, the court may order . . . . separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires . . . ."

Rule 801(c) of the Federal Rules of Evidence reads:

> "Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at

the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Rule 801(d)(2)(E) of the Federal Rules of Evidence, reads:

"Statements which are not hearsay. A statement is not hearsay if . . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Rule 802 of the Federal Rules of Evidence, reads:

"Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of congress."

21 USC 841(a)(1), provides in pertinent part:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to . . . distribute . . . . or possess with intent to . . . distribute . . . . a controlled substance."

21 USC 846 provides in pertinent part:

"Any person who . . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

commission of which was the object of the . . . conspiracy."

STATEMENT OF THE CASE

On July 12, 1978, Petitioner, Dennis Edward McGuire, along with Benjamin Rivera, Leah Jane Skwierc, and Elroy Garcia, were indicted in the United States District Court for the Southern District of Florida on three counts of drug related charges.[1]

A jury trial was held in November, 1978, with only the Petitioner and Rivera being tried. Leah Jane Skwierc pled guilty prior to trial. Elroy Garcia failed to appear at his initial appearance hearing and is a fugitive. During various pre-trial hearings, the trial court had been advised that there was the possibility that a severance may be necessary in order for the Petitioner to obtain exculpatory testimony from Rivera. No written motions had been filed since Rivera's attorney had not decided whethe. Rivera was going to testify during his own defense. (T-40, 41) Rivera decided after the government rested that he was not going to testify on his own behalf. (T-178) Petitioner made an *ore tenus* motion for severance at that time. (T-292) A hearing was held outside the presence of the jury at which time Rivera testified under oath that he would testify for Petitioner at a separate trial and that such

[1]These charges were as follows: Count I-Conspiracy to distribute cocaine in violation of 21 USC 846; Count II-Possession with the intent to distribute cocaine in violation of 21 USC 841(a)(1); and Count III-Distribution of cocaine in violation of 21 USC 841(a)(1). (R-1-3)

testimony would be exculpatory. After the hearing and legal arguments, the motion was denied. Petitioner's defense was entrapment. Without Rivera's testimony, Petitioner's testimony was unsupported. The jury convicted the Petitioner and Rivera on all three counts.

Petitioner timely filed his notice of appeal to the Court of Appeals for the Fifth Circuit. His conviction on all three counts was affirmed on December 26, 1979. Petitioner timely filed a petition for rehearing and suggestion for *en banc*. This was denied on February 20, 1980. This Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit will be timely filed.

FACTS

Drug Enforcement Administration Agent (DEA) Nick S. Zapata assumed the undercover role of a heroin dealer. As a heroin dealer, he told Skwierc and McGuire that he would use the money he made from the sale of heroin to purchase cocaine and bring the cocaine back to Mexico. (T-158)

Zapata met Skwierc some time in April, 1978, and engaged in several drug conversations and dealings. He did not know McGuire until a meeting on June 19, 1978, at a Holiday Inn near the Miami International Airport. (T-43,160) Skwierc introduced Zapata to McGuire at this meeting.

McGuire had met Skwierc at Skwierc's hair boutique where she cut his hair. (T-452) Skwierc had told McGuire of some trouble she was in because of her

involvement with a heroin dealer. (T-456) McGuire agreed to go to the meeting to try to get Skwierc out of the difficulty she was in. (T-455) McGuire had never been involved in drugs prior to the June 19th meeting. (T-160, 455)

McGuire, Rivera and Skwierc were present at the June 19th meeting. Zapata discussed his prior dealings as a heroin dealer. (T-160) Zapata wanted all present to know that he *was* a *big dealer* and that people who knew too much *could and do get hurt*. Zapata told all present of several incidents where people were shot as a result of his narcotic dealings. (T-162) Zapata told McGuire that he was from Mexico and that was where he obtained his heroin to sell in the United States. During this meeting Zapata arranged to purchase cocaine. Zapata arranged to obtain approximately 7 kilograms of cocaine from somone McGuire had met. (T-48) Arrangements were made for the transaction to take place on June 22, 1978. The plan was for McGuire to arrange for delivery of one kilogram of cocaine. Skwierc was to receive the money. (T-52) After the first transaction was satisfactorily completed, the remaining cocaine would be delivered. (T-52)

On June 22, Zapata called Skwierc to advise her that he could not complete the transaction because he did not have the funds. (T-56) Skwierc was to try and have the transaction put off until the next day, June 23rd. (T-56) Skiwerc was able to make the new arrangements and the transaction was re-scheduled for 9:00 P.M., June 23rd. (T-59)

On June 23rd, Zapata met Skwierc at the Ramada Inn near the Miami International Airport. (T-60)

McGuire arrived there about ten minutes late. Skwierc went with Zapata to Room 217 to count the money for the cocaine. (T-68) McGuire went with Zapata's two men (two undercover DEA agents) to get the cocaine.

McGuire and the two men went to another Ramada Inn. At the new motel, the two DEA agents were introduced to fugitive Garcia. Garcia went and retrieved one kilo of cocaine from inside the room. A phone call was made to Zapata to determine if the money was there. Upon learning that the money was there, Zapata's men, Garcia and McGuire left for the Ramada Inn. When they arrived back at the first Ramada Inn, all defendants were arrested. No other cocaine was delivered nor was any found.

McGuire testified on his own behalf. He explained that he was involved in Greyhound racing. (T-450) He had been involved in Greyhound racing since he was 16 years old. (T-450) His working at various jobs at the race track was interrupted by him serving in combat in Viet Nam. Upon his return, he became the youngest presiding judge at Flagler Kennel Club. (T-450) He left that job to go to West Virginia to convert a harness race track to greyhound racing. (T-451) He helped write greyhound racing legislation in Puerto Rico and was involved in establishing greyhound racing in Nevada. (T-452)

McGuire explained that he was never involved with drugs prior to the June 23rd transaction. (T-455) He thought that he could go to the June 19th meeting and convince Zapata to let Skwierc alone. However, when he went to the meeting, Zapata not only confirmed what

Skwierc had told McGuire about Zapata, but McGuire then realized that he was in the same situation that Skwierc was. McGuire now knew that Zapata was a heroin dealer and with that knowledge, if he did not do what Zapata wanted McGuire could be hurt. McGuire stated that he had no intention of getting involved in a cocaine transaction until *after* the June 19th meeting when Zapata told all of those present of what happened during his past drug dealings.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH AMENDMENT RIGHT OF COMPULSORY PROCESS FOR OBTAINING WITNESSES REQUIRE THE GRANTING OF THE PETITIONER'S SEVERANCE WHEN HIS CO-DEFENDANT, UNDER OATH, STATES HE WILL TESTIFY AT A SEPARATE TRIAL AND PROVIDE EXCULPATORY TESTIMONY FOR THE DEFENDANT.

Petitioner sought a severance of his case from co-defendant Rivera, in order to receive a fair trial. McGuire, following the criteria as set forth in *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), called co-defendant Rivera to testify. Rivera refused to testify before the jury during the joint trial, but in sworn testimony outside the presence of the jury stated:

1. He would testify on behalf of McGuire in a separate trial;

2. He would testify that he was present at a meeting at the Holiday Inn on June 19th, when Zapata told McGuire he was a heroin dealer and that he was in Miami to *kill* a woman named *Elma;*

3. He also stated that Zapata portrayed himself as a "big time man" who had bodyguards, back-up men and would travel all over the country to take care of people if it was necessary. (T-401, 402)

4. Rivera also stated that he did not have any knowledge that McGuire was involved in cocaine trafficking prior to June 19, 1978. (T-415)

This Court in *Hampton v. United States,* 425 U.S. 484, reaffirming the principals set forth in *Sorrells v. United States,* 287 U.S. 435 (1932), and *Sherman v. United States,* 356 U.S. 369 (1958), that there is an entrapment defense, "[i]f the result of the government activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce it commission . . ." *Hampton,* supra, at p. 490, citing *Sorrells,* supra at 442.

Petitioner testified that he did not intend to become involved in any drug transaction. He went to the June 19th meeting to convince Zapata to leave Skwierc alone. Therefore, Rivera's testimony was necessary to set forth the tone of the June 19th meeting in order that the jury, faced with conflicting versions of the June 19th meeting, could evaluate McGuire's predisposition. His testimony was directed to Zapata's participation in the June 19th meeting. It established that Rivera had *no* prior drug dealings with McGuire. Rivera stated that Zapata told

McGuire at the June 19th meeting that he was here to take care of people. This meant:

> ". . . that he [Zapata] can go in there and annihilate — take care of the person by killing them or snuffing them out somehow, keeping them quiet in some fashion that they wouldn't, you know, say anything against him in any fashion." (R-402)

The appellate court rejected Petitioner's argument because (1) Petitioner made no showing of what Rivera would testify to; (2) Petitioner failed to connect such testimony to his entrapment defense; (3) there was no showing that Zapata threatened Skwierc or McGuire; and (4) because Rivera took the Fifth Amendment, there was no showing that Rivera would give exculpatory testimony in a separate trial. *McGuire,* supra, at p. 1031. In essence, the appellate court was evaluating Rivera's testimony and concluding that they do not believe the testimony would help Petitioner. The issue for granting the severance was not how believable a witness was but whether what he testified to, if believed was exculpatory. Petitioner's predisposition was the issue. The Government's inducement provided the operative force resulting in Petitioner's action. The Petitioner sought and needed the testimony of Rivera. Petitioner believed it was corroborative of his defense. However, in the final analysis, it was for the jury to determine the extent and effect Rivera's testimony would have on McGuire's defense. That is the essence of the jury system and that is one of the reasons the Sixth Amendment guarantees any defendant the right to call witnesses in his defense. This Petition should be granted in order to prevent the erosion of the Sixth Amendment

right to call witnesses which has occurred by the appellate court's opinion.

II.

RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE DUE PROCESS CLAUSE, REQUIRE A SEVERANCE WHEN THE PETITIONER MUST CHOOSE BETWEEN CROSS-EXAMINING A CO-DEFENDANT'S WITNESS TO SHOW THAT THE WITNESS IS LIEING AND LOSE EXCULPATORY TESTIMONY OF THAT CO-DEFENDANT, OR NOT CROSS-EXAMINE THE CO-DEFENDANT'S WITNESS TO GAIN THE CO-DEFENDANT'S EXCULPATORY TESTIMONY.

In *Simmons v. United States,* 390 U.S. 377 (1968), this Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another." The Supreme Court made it clear that this conflict did not only apply to a Fourth and Fifth Amendment, but rather "applied to [any] situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights." During the trial, the government played (over Petitioner's objection) tape recorded conversations between Agent Zapata and co-defendant Skwierc. During those conversations Skwierc made incriminating statements against Petitioner. Skwierc pled guilty and testified for her lover and co-defendant Rivera. Rivera's defense was presented first to the jury. Since Skwierc had made incriminating

statements against Petitioner on the tape recorded conversation, Petitioner sought to destroy her credibility. However, if Petitioner did establish that Skwierc was not a credible witness, that fact would destroy Rivera's only defense since Skwierc was his only witness. If that occurred, Rivera would not testify for Petitioner. Thus, because of the joint trial, Petitioner had to choose between his Sixth Amendment right to cross-examine witnesses and his Sixth Amendment right to call witnesses.

The appellate court resolved this dilemma by stating that it does not believe Rivera's testimony was exculpatory and that the decision not to cross-examine Skwierc was a tactical one which could have been made because of the fear of greater harm to his case. *McGuire,* supra, at page 1032. The appellate court's decision fails to point out that *Skwierc did testify against* Petitioner through the tape recorded conversations, and thus, failing to cross-examine her would permit those lies to go unchallenged. Petitioner's choice was not whether cross-examining Skwierc would further harm his case, but whether it would result in damaging Rivera's case and lose his exculpatory testimony. This Petitioner should be granted to eliminate the tension between the two constitutional rights created by this situation, a tension which *Simmons,* supra, found intolerable and which could have been eliminated by the granting of the severance motion.

III.

TAPE RECORDED STATEMENTS MADE DURING A DRUG TRANSACTION WHICH ARE CHARACTERIZED AS "PUFFING" AND WHICH HAVE NEVER BEEN VERIFIED AS TRUE, IS HEARSAY AS DEFINED BY RULE 801(c) OF THE FEDERAL RULES OF EVIDENCE AND EXCLUDABLE PURSUANT TO RULE 802.

Petitioner objected to the introduction of a tape recording of a conversation between Zapata and co-defendant Skwierc while she was counting money for the purchase of cocaine, which was simultaneously being displayed to the government purchasers. The appellate court, after reviewing the Ninth Circuit cases of *United States v. Eubanks,* 591 F.2d 513 (9th Cir. 1979), and *United States v. Moore,* 522 F.2d 1068 (9th Cir. 1979), stated that they were not in conflict with the criteria set forth in *United States v. James,* 510 F.2d 546 (5th Cir. 1975), another case cited by Petitioner. The appellate court characterizes Skwierc's statements as "boasts" and "puffing". Petitioner believes that such statements do not aid in seeking the *truth.* These "puffing" and boasting statements were not "in furtherance of the conspiracy" and are exactly the type of statements or evidence which the rules of evidence are designed to eliminate.

Petitioner was charged with a conspiracy to distribute cocaine. The conspiracy was from June 19, 1978 to June 23, 1978. The conversation took place while Skwierc was counting the *money* and the other agents were obtaining the cocaine. Agent Zapata was

questioning Skwierc to get "information" and "incriminating" statements. It was not a situation as the appellate court states, *McGuire,* supra, at page 1033, where Skwierc must "convince" Zapata that he should buy cocaine,[2] nor was this a situation where Skwierc is talking about future transactions.[3] Thus, these puffing and boasting statements are not in furtherance of the conspiracy as charged.

An introduction of "puffing, boasting" statements about another does not aid the fact finder in seeking the truth, just like the "puffing and boasting" of a used car salesman does not aid the buyer in determining the truth about the car. Rule 102 of the Federal Rules of Criminal Procedure delineates the purpose of the Rules to be "the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and [the] proceedings justly determined." Allowing the appellate court's decision to stand without more, would permit the use of "puffing" and "bragging" (unsupportive and inherently fictitious statements) to be substituted for "truth".

There was no evidence in the record to support Skwierc's statements. The trial court would not permit McGuire to question Zapata concerning Skwierc's past drug dealings to impeach those statements. Thus, not only was uncorroborative prejudicial evidence admitted,

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[2]The transaction was already in progress and the agreement had already been finalized.

[3]Since the conspiracy was between June 19, 1978 and June 23, 1978, any discussion of future transactions was not in furtherance of *this* conspiracy.

but McGuire was denied his opportunity to discredit the speaker. To permit "puffing and boasting" to be used in this situation caused unfair prejudice and misled the jury. The Petition should be granted to correct this misinterpretation of the rule and to set forth criteria to aid trial courts in determining what is meant by the phrase "in furtherance of the conspiracy." This case offers a vehicle for such a task.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

Appendix A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Dennis Edward McGUIRE and Benjamin Rivera,
Defendants-Appellants.

No. 79-5020.

United States Court of Appeals,
Fifth Circuit.

Dec. 26, 1979.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

Dennis McGuire and Benjamin Rivera were accused of having taken part in a scheme to sell cocaine along with Leah Skwierc, who pleaded guilty, and Elroy Garcia, who is a fugitive. McGuire and Rivera were tried together, and convicted on each of three counts charged in the indictment: Conspiracy to distribute cocaine, distribution of cocaine, and possession of cocaine with the intent to distribute.[1]

[1] 21 U.S.C. §846 and 21 U.S.C. §841(a)(1); 18 U.S.C. §2.

The uncontroverted facts established that McGuire, Rivera, and Skwierc, Rivera's lover, met in a hotel bar with a man they believed to be a heroin dealer named "Nick" on June 19, 1978. "Nick", however, was federal agent Nicholas Zapata. A discussion on the sale of cocaine to him was held. During the meeting, Rivera vouched for Zapata's ability to pay, and volunteered to count the money when the transaction reached fruition. McGuire offered to procure and deliver the drug. The group agreed upon June 22nd as the date of exchange.

On the 22nd Zapata called Skwierc to advise her that he could not perform on that day. She expressed anger. Zapata talked with Rivera on a second call, and he also spoke angrily about the delay, stating that he had his people ready.

On June 23rd the transaction was attempted. Rivera and Skwierc checked into the appointed hotel, taking a room in his name. Rivera remained in it, and Skwierc went to meet Zapata and McGuire in front of the hotel. The group divided there, Zapata and Skwierc going to another hotel room to count the money, and McGuire and several other agents going to obtain cocaine from Garcia.

As Skwierc counted Zapata's money, their conversation was taped by agents in an adjoining room. She told Zapata that McGuire was the person that she had previously spoken to him about, and that McGuire had a brother in Lima, Peru, who processed cocaine. The tape also contained Skwierc's part of a telephone conversation with McGuire in which she told him the funds were present. It was played to the jury at trial.

Skwierc was arrested by Zapata after she finished counting and talking to McGuire. Her purse was searched incident to the arrest, and the key to Rivera's room was discovered. The agents learned from a hotel clerk that the room was registered to Rivera, and it was entered, searched, and Rivera was arrested. He was found partially undressed, lying on the bed with a half-eaten dinner, and watching television. McGuire was arrested when he returned with the drug.

At their joint trial, McGuire moved for severance, both under *Bryd v. Wainwright*, 428 F.2d 1017 (5 Cir. 1970), and Fed.R.Crim.P. 14. He timely objected to the admission of the taped conversations, arguing they were prejudicial hearsay inadmissible under Fed.R.Ev. 403, and not admissible as a conversation "in furtherance of the conspiracy" under Fed.R.Ev. 801(d)(2). Both motions were denied, and these rulings are assigned to us as error.

McGuire's attempted defense was entrapment. He testified that he was told by his friend Skwierc that she had become involved with the drug dealer, and that he went to the June 19th meeting to extricate her. He testified that once at the meeting he was so intimidated by bellicose statements from Zapata about the potential danger those privy to the dealings were in, that he was compelled to go along in fear of his life. He contends that the alleged errors of the court below set up impermissible road-blocks to the presentation of his entrapment defense.

Rivera moved at trial to suppress any evidence of his presence in the hotel, contending that it was the fruit of an illegal search of his hotel room. The court reserved

its decision, and at the close of the evidence ruled the search unlawful. In the interim, Rivera called Skwierc, who attempted to portray his presence at the hotel *and at earlier meetings* as that of an innocent bystander only accompanying her. He now claims that he was forced to explain his presence at the hotel by the trial court's delay in ruling, supplying the evidence to support his own conviction in denial of his rights to due process and a fair trial. In a separate point Rivera contends the evidence below was insufficient to support the jury's verdict, with or without the testimony of his presence in the hotel. He further assigns as error a comment by the district court that passed-over portions of a tape played to the jury were excluded. In that the prosecutor appeared eager to have the portions played, it is argued that the inference of harmful evidence was raised, denying Rivera due process and a fair trial. He did not, however, raise an objection below.

APPELLANT McGUIRE

The basis of McGuire's *Byrd* motion for severance was to obtain the testimony of Rivera, in order to bolster McGuire's defense of entrapment. Rivera did not in fact testify for the jury, but only pursuant to the motion.

At that time Rivera testified that on June 19th Zapata did speak of being a heroin dealer, a "big man all over the country." On cross-examination Rivera was asked whether he had any prior conversations with McGuire concerning cocaine. He took the Fifth Amendment and refused to answer. On a third question, whether prior to June 19th he had knowledge of McGuire's involvement with cocaine he answered, "no." Rivera testified that he had difficulty remembering the

events of June 19th and had no understanding as to how McGuire had reacted to agent Zapata.

By this court's decision in *Byrd v. Wainwright, supra,* criteria were laid out for a determination of the necessity of severance to obtain a co-conspirator's testimony. Among those criteria are affirmative findings that the proferred testimony is exculpatory, on a clear showing of what the co-defendant would testify to, and that the codefendant is in fact willing to testify.

Here, McGuire failed to meet the exculpatory criteria for severa reasons. He made no clear showing as to what his co-defendant would testify to. He also failed to show any nexus between the somewhat confused example of Rivera's testimony, and McGuire's entrapment defense. It was not established that Skwierc or McGuire were threatened by Zapata, or that they entered the transaction due to such fears, or even that such ideas were communicated between the parties. Further, due to Rivera's use of the Fifth Amendment during cross-examination, there was not shown a likeliood that he would have been willing to give exculpatory testimony on a separate trial.

The *Byrd* court noted that . . . "[I]f the testimony is purely cumulative, or of negligible weight or probative value, the court is not required to sever. The requirement is not a trial which guarantees the defendant every item of evidence he would like to offer, but one which meets the constitutional standards of due process." 428 F.2d at 1021. We find that standard to have been met below and accordingly overrule McGuire's contention that he was entitled to a severance under the authority of *Byrd.*

McGuire additionally moved for severance under Fed.R.Crim.P. 14.[2] He argues that joint trial with Rivera subject him to unfair prejudice by compelling a choice between his constitutional rights to cross-examine adverse witnesses and to call witnesses in his favor.

McGuire has stated that he moved for a severance when he was surprised by Skwierc's guilty plea, and Rivera's calling her to testify for him. Her voir dire testimony had painted him as the primary figure behind the transaction. McGuire continues to assert that Rivera was willing to give exculpatory testimony for him. Thus, he claims that he could not conduct a vigorous cross-examination of Skwierc without risking the ire of Rivera and the loss of his testimony. He did not cross-examine Skwierc.

We view McGuire's choice in a different light. In most joint trials of those accused of participation in a criminal scheme, conflicts involving a choice of tactical alternatives will arise, particularly where different defenses are urged. The appropriate policy, long sanctioned by the decisions of this court, is that persons jointly indicted should be jointly tried, particularly in conspiracy cases. *United States v. Kelly,* 569 F.2d 928 (5 Cir. 1978). Rule 14, addressing problems of prejudice,

[2]Rule 14 in pertinent part provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires.

involves the tension between that policy and those joinders that result in unfair prejudice. Accordingly, a District Court confronted with a Rule 14 Motion for Severance is required to balance any such prejudice against the interests of judicial economy, a consideration involving substantial discretion. *See United States v. McLaurin,* 557 F.2d 1064, 1974-5 (5 Cir. 1977).[3]

The burden upon an appellant in showing prejudice has aptly been characterized as "heavy." *United States v. Lane,* 465 F.2d 408, 413 (5 Cir. 1972).

[1] McGuire has shown that he was confronted with a tactical choice. What he has not demonstrated is that joinder compelled him to make the choice of cross-examining Skwierc or not, and thus he has failed to demonstrate any prejudice flowing from denial of the motion. We note that Skwierc's actual testimony before

[3]*McLaruin* quotes *Tillman v. United States,* 406 F.2d 930, 935 (5 Cir. 1969), vacated in part, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969), for the general test used in determination of a Rule 14 Severance Motion:

> ***[W]hether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.

McLaurin, 557 F.2d at 1075.

the jury was limited to exculpation of Rivera and involved no significant inculpation of McGuire. Further, even if McGuire were tried separately, Skwierc's testimony would have been within range of the Government's subpoena power. Appellant's motivation in refusing to cross-examine could just as easily have been fear of greater harm.[4] We remain unconvinced that Rivera had exculpatory testimony for McGuire. In sum, McGuire's argument amounts to speculation heaped upon speculation, and does not approach the strong showing of prejudice required. The court below did not abuse its discretion in denying the Severance Motion.

In his second assignment McGuire contends that it was error to admit as evidence certain portions of the recording made of Skwierc and Zapata as she counted the money immediately prior to her arrest. Those portions are alleged to contain prejudicial hearsay barred by Fed.R.Ev. 403, and not within the exception afforded co-conspirator statements made "in furtherance of the conspiracy," within Fed.R.Ev. 801(d)(2)(E).

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[4]It should be noted that on oral argument, attempting to explain why the opportunity was passed, counsel for McGuire stated:

> The reason why we didn't do that in front of the jury is because it was clear to us that this lady was lying. She was lying during the trial, she was lying during the direct testimony, she was impeached by the Government, she was lying on a tape recorded conversation, she was lying. There was no sense in putting this woman up to answer questions she was going to lie about.

The declarations complained of consist of comments by Skwierc to Zapata that McGuire was the person they had previously spoken about, and statements that McGuire's brother processed cocaine in Peru. Also included was Skwierc's part of a conversation with McGuire in which she told him that the funds were present.

[2] McGuire stated in his brief that "this court has not set forth a criteria to aid trial courts in determining what is meant by the phrase 'in furtherance of the conspiracy.' " He relied upon two cases decided in the Ninth Circuit, *United States v. Eubanks,* 591 F.2d 513 (9 Cir. 1979) and *United States v. Moore,* 522 F.2d 1068 (9 Cir. 1975). We disagree with his statement concerning lack of direction in this court, noting that criteria were set forth in *United States v. James,* 510 F.2d 546 (5 Cir. 1975). We perceive no conflict between the Ninth Circuit cases and *James.* Under any of the authorities cited, the recorded statements are co-conspirator declarations squarely within the "in furtherance" exception.

[3] In *James,* this court held that in order for co-conspirator statements to be admissible under Rule 801(d)(2)(E), there must be proof *aliunde* of the existence of a conspiracy, and of the defendant's involvement in it. 510 F.2d at 549. Here, there was more than adequate proof of both elements. In addition, the statements must simply be "in furtherance of the conspiracy." Mere conversation between co-conspirators is not admissible under this exception. It was noted in *James* that though the phrase has a "talismanic" ring, "we must not apply the standard too strictly, lest we defeat the purpose of the exception."

Id.[5] It is obvious that the telephone conversation with McGuire concerning delivery of the funds contributed directly to fruition of this transaction. The other comments we view as a form of "puffing." Skwierc, McGuire and Rivera wre engaged in a commercial enterprise, albeit an illegal one. They had found an outlet in Zapata, and the Skwierc statements were a combination of boasts and information directed toward obtaining his confidence that they possessed both a source and the will to deal with him. The District Court acted properly in admitting these portions of the tape.

APPELLANT RIVERA

Rivera in his first assignment contends that the District Court erred in ultimately allowing the jury to hear and consider evidence of his presence in the hotel where this transaction was to be culminated. The facts surrounding his arrest are alleged to be the evidentiary fruit of an unlawful entry into his hotel room by agents using the key discovered in Skwierc's purse incident to her lawful arrest. Rivera moved at trial to suppress evidence of his presence.[6] The court reserved its ruling.

[5]Indeed, the Trial Court appears to have had the meaning of *James* well in hand when he told counsel:

> You see, here is where you and I are having our problem: You are treating the words "in furtherance of the conspiracy" in a very literal sense that the statement that is made at any given time by a co-conspirator has to literally be in the advancement of the conspiracy, and I am saying to you I think that is probably too literal.

[6]The Government maintains that the motion was untimely. Our disposition of this point does not require us to decide the question.

Rivera claims that this delay forced him to call Skwierc as a witness to explain his presence.[7] At the close of the evidence, Rivera pressed the court to rule on his motion to suppress, and the entry was ruled unlawful. However, the prosecution was allowed to argue Rivera's presence to the jury, on the ground that he had placed it in evidence himself.[8] In this sense, Rivera contends he was

[7]We note that the Trial Court was not pressed to rule on the suppression motion immediately prior to Skwierc's testimony, and that she attempted to explain not only his presence at the hotel, but also his participation in the earlier meetings. For these reasons we doubt that the District Court's action forced Rivera to call Skwierc.

[8]The District Court's rationale or ruling the entry unlawful and yet allowing argument on Rivera's presence is best described by comments made at the time of the ruling:

> MR. ROBBINS: Well, my problem was that your Honor wanted to take it under advisement. You had not made a ruling at that point, so I had to go forward with my case.
>
> THE COURT: Well, now, I am in a predicament, as Mr. Zimet said, that is true.
>
> MR. ZIMET: I am not saying he is in a predicament. I am saying his arguments are not consistent.
>
> THE COURT: Well, now, I understand what you both are saying. I think technically — and this will be in the form of a ruling — I think technically you are correct that there was an illegal search and seizure. I think, however, that you cannot prevent the Government from arguing he was there, if only from the registration and the admissions of Leah Skwierc.
>
> MR. ROBBINS: Okay.
>
> THE COURT: Do you understand what I am saying?
>
> MR. ROBBINS: Yes, your Honor.
>
> THE COURT: So as far as the argument that he was there is derived from the fact that they walked in the door and saw him, your point is well taken, and I so rule.

forced to supply crucial evidence that went to convict him.

This series of arguments may be disposed of without considering all of the tangents Appellant would have us pursue. We find that the entry to arrest Rivera was lawful, and that the evidence of Rivera's presence, being no more than the factual context of a lawful arrest was properly before the jury.

It has been repeatedly held to be the law of this circuit that where officers "have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant, the arrest is not constitutionally invalid." *United States v. Gaultney,* 581 F.2d 1137, 1146 (5 Cir. 1978), *citing United States v. Williams,* 573 F.2d 348 (5 Cir. 1978), *United States v. Hofman,* 488 F.2d 287 (5 Cir. 1974). Probable cause will exist where " 'the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.' " *United States v. Savage,* 564 F.2d 728, (5 Cir. 1977). In *Savage,* this court held that officers had probable cause to enter a hotel room and arrest the Appellant without a warrant, where they knew that someone in the room had passed a counterfeit bill, and Savage, identified as the passer, was seen returning to the room. *Hofman,* another counterfeiting case, also involved government surveillance of a hotel room. An agent purported to sell to a defendant who had brought money from the room, and was arrested. The court upheld the validity of an entry of the room to

arrest the others on that basis, citing *Williams.* 488 F.2d at 289.[9]

[4] In this case, the agents had personal knowledge of Rivera's deep involvement in the conspiracy to sell cocaine, and learned of his presence in another room of the hotel where the transaction was taking place, with little time before completion should occur. The officers had probable cause to arrest Rivera, and the exigencies of this situation demanded and excused an immediate entry of his room to arrest him.

Rivera's second assignment involves sections of the tape recording made of Skwierc and Zapata which were excluded by the District Court. The tape was played to the jury by passing over excluded portions. The record indicates that the prosecutor manifested a desire to have the passed-over portions played, thus, according to Rivera's argument, raising an inference that excluded evidence was harmful to him.

[5] Rivera did not object below, and thus we must determine whether these actions constituted "plain error" denying Appellant due process and a fair trial. Under that analysis, we will reverse only for errors involving serious deficiencies which affect the fairness, integrity, or public reputation of the judicial

[9] *Staples v. United States,* 320 F.2d 817 (5 Cir. 1963), which appears similar to this case at first glance, is distinguished. There, this court required suppression of evidence found in the search of a hotel room using a key found in an earlier search. The *Staples* holding turned on the illegal character of the first search, yielding the key. The arrest of Skwierc and the subsequent search of her purse were lawful. We do not understand Appellant to argue otherwise.

proceedings or which constitute obvious error. *See United States v. Cook*, 592 F.2d 877 (5 Cir. 1979). We find no such error here, where the District Court instructed the jury: "The testimony and exhibits to which the court has sustained an objection, or which the court has ordered stricken from the record, do not constitute evidence and must not be considered by the jury."

Finally, Rivera contends that the evidence was insufficient on all counts to support his conviction, with or without the evidence of his presence at the hotel. We will consider that evidence. The Government submitted in its brief that the evidence was patently sufficient on count one, conspiracy to distribute, and was sufficient on an aider-abettor theory as to counts two and three, possession with intent to distribute and distribution. On oral argument the Government voluntarily stated that the evidence on the last two counts was "weak."

[6] We find the evidence easily sufficient to sustain the conspiracy count. Rivera was present at the formative meetings, volunteered to count the money, vouched for Rivera, and expressed anger when the agents could not perform on June 22nd. However, on the two substantive counts, the sum of the evidence is (1) that Rivera drove Skwierc to the hotel on June 23rd, and (2) that he was in the hotel, alone in a different room. These facts are, in our view, insufficient to support the conviction on counts two and three, on an aider and abettor theory.

Therefore, the conviction of Benjamin Rivera on count one is affirmed. His conviction on counts two and

three is reversed, and the District Court is ordered to dismiss those counts. The conviction of Dennis McGuire on each of the three counts is affirmed.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Appendix B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 20, 1980

Gilbert F. Ganucheau
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 79-5020 —

-vs-

United States of America
Dennis Edward McGuire, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By _____
Deputy Clerk

cc: Mr. Michael J. Doddo
Mr. Robyn J. Hermann
Mr. Jack V. Eskenazi
Mr. Bruce A. Zimet
Mr. Frank J. Marine